FOR ARGUMENT.

FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-343

In the Supreme Court of the United States

OCTOBER TERM, 1979

SUN SHIP, INC., APPELLANT

v.

COMMONWEALTH OF PENNSYLVANIA WORKMEN'S COMPENSATION APPEAL BOARD, ET AL.

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state may apply its workers' compensation law to land-based injuries that are within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

INTEREST OF THE UNITED STATES

The Secretary of Labor is responsible for the general administration of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33

U.S.C. 901-950, and its several statutory extensions.[1] See 33 U.S.C. 939. The Secretary's responsibilities have been delegated to the Director of the Office of Workers' Compensation Programs. See 20 C.F.R. 701.201-701.203. The relationship between state workers' compensation systems and the LHWCA may affect the benefits available under the LHWCA and the proper administration of the Act. Hence, this Court's determination of the nature of that relationship may have a substantial impact on the performance of the Director's official duties.

STATEMENT

Each of the five private appellees was injured in the course of his employment in the shipbuilding or repair operations at appellant's shipyard adjacent to the Delaware River in Chester, Pennsylvania, between May 1973 and June 1975 (J.S. 8; J.S. App. A3, A19, A26, A33-A34, A40-A41, A48). In each case, the injury caused a permanent facial scar.

Appellees filed claims for workers' compensation benefits under the Pennsylvania Workmen's Compensation Act. Appellant contended that the injuries were within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, and that such coverage is exclusive, preempting the otherwise applicable state law.

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[1] See District of Columbia Workmen's Compensation Act, D.C. Code Ann. §§ 36-501 to 36-502 (1973); Defense Base Act, 42 U.S.C. 1651-1654; Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171-8173; Outer Continental Shelf Lands Act, 43 U.S.C. 1333(c).

Appellees did not dispute that the LHWCA applied to their injuries but disagreed that the coverage of the federal statute is exclusive. In four cases, the referee (the state hearing officer) rejected appellant's argument and awarded compensation for a "serious and permanent facial disfigurement" under Section 306(c)(22) of the Pennsylvania law, Pa. Stat. Ann. tit. 77, § 513(22) (Purdon Cum. Supp. 1979) (J.S. App. A54-A57, A61-A64, A65-A68, A69-A72). In appellee Fields' case, the referee also found that a serious and permanent disfigurement had occurred, but he accepted appellant's argument and dismissed the claim (J.S. App. A58-A60).

Appeals were taken in each case to the Pennsylvania Workmen's Compensation Appeal Board, which, in substantially identical opinions, sustained the four awards (J.S. App. A18-A24, A33-A39, A40-A46, A47-A53) and reversed the dismissal of appellee Fields' claim (J.S. App. A25-A32). The Board, adopting the rationale of *Umbehagen* v. *Equitable Equipment Co.*, 329 So.2d 245 (La. Ct. App.), review denied, 333 So.2d 241 (La. 1976), found that it was unlikely that Congress had intended to preempt state compensation laws by passage of the 1972 amendments to the LHWCA, because the history of the relationship between the original LHWCA and state compensation laws had shown that "'concurrent jurisdiction is the only workable policy'" (J.S. App. A21).

The Commonwealth Court consolidated the five cases on appeal and affirmed (J.S. App. A1-A10). It found that nothing in either the language or the legislative history of the 1972 amendments to the LHWCA indicated a clear intention to preempt state laws (*id.* at A6-A7). The court concluded that "the federal interest in providing some compensation to injured workmen would be more nearly served by continuing the concept of concurrent jurisdiction" (*id.* at A7).

The Supreme Court of Pennsylvania denied appellant's petitions for allowance of appeals (J.S. App. A11-A15).

SUMMARY OF ARGUMENT

I.

The constitutional requirement of a uniform maritime law does not bar the application of the state legislation involved here. In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court held that there exists an area of traditional maritime law in which the need for uniformity precludes the application of any state legislation. The so-called *Jensen* line, however, has never been held to extend to land-based injuries such as those involved in this case or even to the limits of the coverage of the pre-1972 LHWCA. In *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court explicitly held that *Jensen* was confined to its facts, relating to vessels on the navigable waters, and that the *Jensen* line does not move in tandem with a congressional extension of federal admiralty jurisdiction. Accordingly, the 1972 extension of LHWCA coverage does not

suggest that *Jensen* should be extended to prohibit the application of the Pennsylvania Workmen's Compensation Act in this case.

II.

If state law is preempted by federal law, an application of the state law violates the Supremacy Clause. In order to support a finding that state jurisdiction has been ousted, however, the intent of federal law to preempt must be clearly manifested or the state law must be inconsistent with the federal law. The 1972 amendments to the LHWCA do not indicate that Congress intended to preempt state law. And under the doctrine of *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947), which permits a supplemental award to be made under a compensation statute in one jurisdiction that provides higher benefits as long as credit is given for amounts paid under a prior award in another jurisdiction, the application of state law does not conflict with the purposes of the LHWCA.

In 1972, Congress deleted the provision in Section 3(a) of the Act (33 U.S.C. (1970 ed.) 903(a)) that made LHWCA benefits available only where recovery "may not validly be provided by State law." This section was the only provision of the LHWCA that ever suggested that federal and state law operated in mutually exclusive spheres and that federal law could not intrude where state law was entrenched. Its deletion in 1972 surely does not signify an intent to preempt state law. The deletion simply recognized that jurisdiction was, in fact, concurrent between

federal and state law, and in addition, that the 1972 amendments extended the coverage of the Act to areas in which the validity of state law coverage had never been subject to doubt.

Section 5 of the LHWCA (33 U.S.C. 905) also does not indicate an intent to preempt state law. That section makes the workers' compensation remedy exclusive of other types of remedies (such as those available under tort or admiralty law), but not of other jurisdictions' workers' compensation statutes. Prior to 1972, Section 5 (33 U.S.C. (1970 ed.) 905) was not considered inconsistent with concurrent jurisdiction. Moreover, similar exclusivity provisions in state workers' compensation statutes have not been construed to bar a supplemental award under the statute of a sister state. By contrast to the situation here, when Congress has sought to make a compensation remedy exclusive of state compensation laws, it has done so by specific and unmistakable language. See 42 U.S.C. 1651(c); 5 U.S.C. 8173.

The legislative history of the 1972 amendments does not evidence an intent to preempt state law. The Senate and House Reports clearly indicate that Congress was principally concerned about the inadequacy of state benefits relative to federal benefits. Accordingly, it extended federal jurisdiction to areas that had previously been within exclusive state jurisdiction so as to make federal benefits uniformly available to employees who worked both within those areas and within areas that had been covered under the pre-1972 Act. Congress did not intend to disturb the concurrent operation of state law that did not interfere with this purpose of making the level of federal benefits uniformly available.

The application of state law under the concurrent jurisdiction principles of *Industrial Commission* v. *McCartin, supra,* does not conflict with the LHWCA. If the state award is more favorable than the benefits available under the LHWCA, a claimant's resort to his state remedy would not conflict with the purposes of the LHWCA. If the state award is less favorable, the purposes of the LHWCA may still be realized by a supplemental award under the federal statute. The issue of the continuing validity of *McCartin* is now before the Court in *Thomas* v. *Washington Gas Light Co.*, No. 79-116, argued March 19, 1980. If state law operates to prevent an employee from receiving the amount of benefits to which he is entitled under the LHWCA, it does conflict with the purposes of the Act. Thus, to the extent that the decision in *Thomas* has the effect of barring a supplemental award under the LHWCA, state law would be preempted when coverage overlaps, either completely or at least when the state benefits are less favorable than the federal benefits.

Finally, a finding that federal law preempts state law would resurrect many of the administrative difficulties that prevailed during the 1927-1942 period. Before applying state workers' compensation statutes in cases involving land-based injuries to maritime workers, state courts would be forced to consider difficult questions of the scope of the LHWCA. Claimants would thus run some risk of losing a remedy because

of an inability to determine with assurance at the outset which law applies. Accordingly, the court below, like the majority of courts and commentators that have considered the question, correctly held that the 1972 amendments do not preempt state law but rather permit the same concurrent jurisdiction relationship between state law and the LHWCA as exists under *McCartin* between workers' compensation statutes of sister states.

ARGUMENT

THE APPLICATION OF THE PENNSYLVANIA WORKERS' COMPENSATION STATUTE TO APPELLEES' CLAIMS RESULTING FROM INJURIES ON LAND DOES NOT VIOLATE THE CONSTITUTION

I. THE FEDERAL INTEREST IN COMPENSATING MARITIME WORKERS INJURED ON LAND DOES NOT REQUIRE NATIONAL UNIFORMITY

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act to extend its coverage to certain maritime workers injured on land.[2] Relying on *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), appellant contends (Br. 15-22, 25, 27 n.8) that this extension of coverage ousted the states of the jurisdiction that they had historically exercised over such injuries. *Jensen*, appellant argues, establishes that the federal interest in maritime law is a paramount one that requires uniformity and that the Constitution thus bars any state legislation in this area. According to appellant, when

[2] See 33 U.S.C. 902(3), 903(a). See generally *P. C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979), slip op. 2-4; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 260-265 (1977).

Congress amended the LHWCA in 1972 to extend maritime coverage shoreward, it also extended the *Jensen* uniformity requirement. This argument, however, ignores the limited holding of *Jensen* and is inconsistent with later decisions of this Court.

The injury in *Jensen* was sustained by a longshoreman on a gangway above the water. It thus occurred in an area traditionally thought to be covered by maritime law, to which the federal judicial power extends under the Admiralty Clause (Art. III, Sec. 2) of the Constitution. In deciding whether the New York Workmen's Compensation Act could apply to such an injury, this Court recognized that state legislation may modify or affect the general maritime law unless it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216. The Court viewed New York's attempt to impose its obligations on a foreign ship as just such an interference that would "seriously hamper[] and impede[]" international and interstate navigation. 244 U.S. at 217.[3]

[3] Appellant's assertion (Br. 15 n.4) that *Jensen* held that the Federal Employers' Liability Act (FELA), 45 U.S.C. 51-60, "could not apply" because "the need for uniformity in maritime matters was so great" is incorrect. The Court found that the FELA was not applicable by its terms because the employee was engaged in work unrelated to rail operations, even though the shipowner also happened to be a railway company. 244 U.S. at 212-213.

Injuries to maritime workers that occur on land, such as those in the instant case, have little connection with the principle of uniformity enunciated in *Jensen* and are wholly outside its scope. The general maritime law provided no remedy for such injuries, and thus the application of state law involves no interference with any necessary uniformity of maritime law. Accordingly, only a few years after the *Jensen* decision, this Court specifically held that the *Jensen* rule did not extend to land-based injuries. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). The Court also has long rejected the contention that *Jensen* precludes the application of state law to any injury that is within the federal admiralty jurisdiction and covered by a federal remedy. State law was applicable to such injuries where the employment was "maritime but local" and hence where the application of state rules would not "work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity." *Sultan Ry. & Timber Co.* v. *Department of Labor and Industries*, 277 U.S. 135, 137 (1928). See also *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922). Indeed, under the "twilight zone" doctrine, state law could even apply in an area that was only arguably "maritime but local." *Davis* v. *Department of Labor and Industries*, 317 U.S. 249 (1942). In sum, as long as a case involved local aspects, rather than being of such a character that nationally uniform rules were required, application of

state workers' compensation law has always been viewed as permissible.[4]

The Court only recently has rejected the idea that a congressional extension of the admiralty jurisdiction implies a corresponding extension of the *Jensen* line. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), involved a challenge to a Florida statute fixing liability for pollution damage caused by ocean-going vessels. One basis for the challenge was that the statute was unconstitutional under *Jensen*, primarily because it intruded into areas that were covered by the Admiralty Extension Act of 1948, 46 U.S.C. 740, which extended the admiralty jurisdiction of the United States to injuries on land caused by vessels on the navigable waters. See 411 U.S. at 337-341. The Court disagreed, reaffirming the principle that "[e]ven though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law." 411 U.S. at 341.

The Court did not reject the principle of *Jensen*. There continue to be certain traditional areas of maritime law in which the need for uniformity precludes the applicability of state law. The Court found, however, that the *Jensen* rule is "confined to * * * suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews." 411 U.S. at 344. Beyond *Jensen*, there is a much

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[4] See also *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959); *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854 (1949); *Bethlehem Steel Co.* v. *Moores*, 335 U.S. 847 (1948).

broader area where Congress may constitutionally exercise its admiralty powers, but not necessarily "to the exclusion of powers traditionally within the competence of the States." 411 U.S. at 341.[5] The Court in *Askew* declined to construe the Admiralty Extension Act "to move the *Jensen* line of cases shoreward to oust state law from situations involving shoreside injuries" that were within the coverage of the Act. 411 U.S. at 344. By the same token, there can be no doubt that the 1972 extension of the LHWCA to land-based injuries of maritime workers also falls within this broader area and that the Admiralty Clause does not bar the application of state law to such injuries.[6]

Appellant (Br. 44 n.16) seeks to distinguish *Askew* on the ground that the Federal Water Quality Im-

[5] Cf. *Oil Workers* v. *Mobil Oil Corp.*, 426 U.S. 407, 420 n.12 (1976) (state "right-to-work" laws cannot apply to seamen whose work is performed primarily on high seas even though hired within state, but can apply "to maritime workers, such as longshoremen, whose job situs is within the State").

[6] Indeed, the 1972 extension of the LHWCA was quite limited in comparison to the Admiralty Extension Act considered in *Askew*, because the amendments to the LHWCA did not purport to extend the admiralty jurisdiction of the United States. In suggesting an extension of the LHWCA in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 216 (1971), this Court observed that "extending the constitutional boundaries of the maritime law would not require Congress to make an equivalent extension of the jurisdiction of the federal courts sitting in admiralty." Congress responded to this suggestion by merely extending a maritime-power federal remedy to a subject outside the historic boundaries of maritime law, without bringing the subject within the bounds of the full admiralty jurisdiction.

provement Act expressly allowed state regulation. As the Court recognized in *Askew* (411 U.S. at 344), however, in areas where the *Jensen* uniformity rule applies, Congress does not have the power to permit state regulation. See *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920). *Askew* establishes that *Jensen* is not applicable here. The question then remains whether application of the state law conflicts with the LHWCA and thus violates the Supremacy Clause. It is to this question that we now turn.

II. APPLICATION OF A STATE WORKERS' COMPENSATION STATUTE TO THE LAND-BASED INJURY OF A MARITIME EMPLOYEE DOES NOT VIOLATE THE SUPREMACY CLAUSE

Appellant contends that application of the Pennsylvania Workmen's Compensation Act violates the Supremacy Clause because the LHWCA, as amended in 1972, preempts state law within the scope of its coverage. Although the injuries involved in this case are within the jurisdiction that has been exercised under state workers' compensation statutes for many decades, it is undisputed that Congress could have preempted state coverage that overlapped with the LHWCA had it chosen to do so. The inquiry into whether such preemption has actually occurred begins with the fundamental principle that the powers of the states are "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ray* v. *Atlantic Richfield Co.*, 435 U.S.

151, 157 (1978). See also *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[7] Apart from clear statutory language, such a congressional purpose may be evidenced when the federal scheme is so pervasive as to leave no room for state supplementation, or when the federal interest, such as in the field of foreign affairs, is so dominant that preemption of state law may be assumed, or when enforcement of the state statute is inconsistent with the objective of the federal statute. *Rice* v. *Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230. Under these principles, we submit that, as the Commonwealth Court found, the LHWCA does not preempt state workers' compensation statutes where coverage overlaps, but rather permits concurrent coverage.

Appellant fundamentally misperceives the nature of this concurrent jurisdiction. Appellant apparently assumes (see Br. 23, 56) that concurrent jurisdiction means only that either state or federal law may apply in the first instance, but that once jurisdiction is exercised under one law, the applicability of the other law is precluded. But this Court has made clear that concurrent jurisdiction in the workers' compensation area, at least as between state statutes, is not mutually

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[7] This principle is particularly strong in the workers' compensation field. The Court has stated, in connection with the relationship between two state statutes, that only "unmistakable language" in one state's workers' compensation statute will warrant the conclusion that the statute is intended to "cut off an employee's right to sue under other [workers' compensation] legislation passed for his benefit." *Industrial Commission* v. *McCartin*, 330 U.S. 622, 628 (1947).

exclusive in this manner. In *Industrial Commission* v. *McCartin*, 330 U.S. 622 (1947), the Court held that where the workers' compensation statutes of two different states are applicable to the same injury, an award under the statute of one state may be supplemented by an award under the statute of the second state, so long as a credit is given for the amounts paid under the first award. The Court stated in *McCartin* that it would be presumed that such a supplemental award could be made unless the first state evidenced by "unmistakable language" its intention that its award act as a bar to any supplemental award.

The strong policy interests supporting supplemental state workers' compensation awards apply with equal force to supplemental LHWCA awards. For this reason, it has generally been understood that, to the extent concurrent jurisdiction exists under the LHWCA, the *McCartin* rule permitting supplemental awards governs. See G. Gilmore & C. Black, *The Law of Admiralty* 431-432 (2d ed. 1975); 4 A. Larson, *The Law of Workmen's Compensation* § 89.53 (1978). Hence, a determination of liability under a state statute has been held not to bar a subsequent LHWCA award. See *Newport News Shipbuilding and Dry Dock Co.* v. *Director, OWCP*, 583 F.2d 1273 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F.2d 409 (9th Cir. 1952); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F.2d 968 (4th Cir. 1951); but cf. *Shea* v. *Texas Employers' Insurance Ass'n*, 383 F.2d 16 (5th Cir. 1967) (state award held to bar LHWCA claim because state act and LHWCA held mutually exclusive).

A. The 1972 Amendments to the LHWCA Did Not Purport To Oust The States Of Concurrent Jurisdiction

1. *The Amendment of Section 3(a) of the LHWCA Was Not Intended to Preempt State Coverage*

Prior to 1972, Section 3(a) of the LHWCA provided that compensation was available under the Act where the injury "occur[s] upon the navigable waters * * * and if recovery for the disability or death through workmen's compensation proceedings *may not validly be provided by State law.*" 33 U.S.C. (1970 ed.) 903(a) (emphasis added). Appellant argues (Br. 25-39) that the deletion of the "may not validly be provided by State law" clause in 1972 manifests Congress' intent to preempt state law. On its face, of course, it is the deleted phrase itself that seems to suggest an exclusivity between state and federal law, and the deletion would appear to be strong evidence of an intent to reject such an exclusive relationship. Moreover, the history of the interpretation of the LHWCA confirms that the deletion was not intended to effect a preemption of concurrent state coverage.

The state law limitation in Section 3(a) originally was thought to draw a line, albeit an extremely murky one, between injuries that were covered exclusively by the LHWCA and injuries that were covered exclusively by state statutes. See, *e.g.*, *Alaska Packers Ass'n* v. *Marshall*, 95 F.2d 279 (9th Cir. 1938). See generally G. Gilmore & C. Black, *The Law of Admiralty* 418-420 (2d ed. 1975). If state law applied, federal law did not. In 1942, however, the Court acknowledged that no sharp line could be drawn between federal and state jurisdiction prior to litigation. In *Davis* v. *Department*

of Labor and Industries, 317 U.S. 249 (1942), the Court held that an award could validly be provided under either state law or the LHWCA for an injury that fell within the "twilight zone" of uncertainty as to whether state law could apply. Thereafter, in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), the Court held that the LHWCA extended to any injury on the "navigable waters" of the United States, whether or not the injury could be covered by state law. The Court, however, did not disturb the long line of cases dating from *Davis* that recognized a sphere of concurrent state and federal jurisdiction. Indeed, *Calbeck* underlined the principle that state and federal jurisdiction were concurrent, not mutually exclusive, in permitting a claimant who had already received payments under a state statute to receive an award under the LHWCA subject to credit for those payments. 370 U.S. at 131-132.[8]

Appellant recognizes that *Calbeck* delineated an area of concurrent jurisdiction (see Br. 34, 39) but mistakenly asserts (Br. 37) that it was the "may not validly be provided" language of Section 3(a) that led to that result. In fact, it was despite the strong implications of that language that the Court recognized concurrent jurisdiction. See *Calbeck* v.

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[8] This ruling did not conclusively establish that the *McCartin* rule permitting supplemental awards applied to the LHWCA, because the claimant had received voluntary payments rather than payments pursuant to an award. However, in citing authority in support of the supplemental LHWCA award, the Court did not draw a distinction between cases involving voluntary payments and cases involving final state awards.

Travelers Insurance Co., supra, 370 U.S. at 132 (Stewart, J., dissenting). Indeed, some commentators suggested that the state law limitation of Section 3(a) was no longer of any continuing significance in light of *Calbeck.* See 4 A. Larson, *The Law of Workmen's Compensation* § 89.25 (1978).[9] In any event, the limitation was clearly inconsistent with the intention of the 1972 amendments to extend the LHWCA to cover certain injuries on land, which were not even within the area where state law coverage was deemed questionable under *Jensen.* Consequently, the limitation was deleted.

It is undisputed that the 1972 amendments extended federal coverage to injuries within state jurisdiction; the question is whether those changes displaced state coverage or established concurrent coverage. The deletion of the state law limitation is relevant to the first point, because it indicates that coverage under state law cannot preclude LHWCA coverage, but the deletion does not in any way suggest an intent to go further and to preempt state coverage. To the contrary, as noted above, the deletion eliminated the only language in the LHWCA that could be read as supporting a mutually exclusive relationship

[9] But see *Shea* v. *Texas Employers' Insurance Ass'n, supra,* where the court held, after *Calbeck,* that the state law and the LHWCA were mutually exclusive; hence, an LHWCA award could not supplement a state award. *Shea* was roundly criticized as being inconsistent with *Calbeck.* See, *e.g.,* 4 A. Larson, *The Law of Workmen's Compensation* § 89.53(b) (1978). The decision has no validity today because, in finding state and federal coverage to be exclusive, it relied solely on the state law limitation that was deleted in 1972. See 383 F.2d at 18-19.

between state and federal coverage. In the absence of such an express statement of purpose to make the federal Act exclusive where it applies, it would appear that Congress intended to preserve the concurrent jurisdiction that had existed prior to 1972 and that is common in the workers' compensation field between state statutes under the principles of *McCartin.*

2. *The Exclusive Remedy Provision of the LHWCA Does Not Preclude Relief Under State Workers' Compensation Laws*

Appellant also contends (Br. 22-25) that provisions of the LHWCA in existence prior to 1972 make the benefits under the Act mandatory and exclusive. We do not dispute that the LHWCA is "mandatory" in the sense that it requires that the benefits it provides be available as compensation for injuries within the coverage of the Act.[10] Thus, any state proceedings that purport to displace the right to benefits under the LHWCA would violate the basic scheme of the Act. But no such interference with federal rights is comprehended by the decision of the Commonwealth Court. Federal rights are preserved under the *McCartin* principle either because a state award provides the level of benefits available under the LHWCA or, if it does not, because an award may be made under the LHWCA to supplement the state award.

Appellant erroneously asserts that Section 5(a) of the Act, 33 U.S.C. 905(a), makes the benefits under the LHWCA exclusive of any state benefits. But

[10] This feature of the Act is particularly evident in the anti-waiver provisions. 33 U.S.C. 915(b), 916.

that section is simply a general exclusivity provision that is patterned after and virtually indistinguishable from similar provisions in every state workers' compensation statute. The purpose of the provision is to substitute the workers' compensation remedy for tort and other remedies, not to affect the workers' compensation remedies of other jurisdictions.[11] Similar provisions in state statutes have been held not to bar remedies under the workers' compensation statutes of other states. *Industrial Commission* v. *McCartin, supra.* See generally 4 A. Larson, *The Law of Workmen's Compensation* § 85.40 (1978). And Section 5(a) of the LHWCA itself has never been held to preempt state coverage, else the concurrent jurisdiction recognized prior to 1972 could never have been established.

If Congress had desired to alter the pre-1972 concurrent jurisdiction system to preempt state law, it could easily have done so by express language referring to state statutes. In fact, Congress has used such express language in other compensation statutes, particularly statutes that incorporate the LHWCA by reference, when it has intended to preempt state law. See 42 U.S.C. 1651(c); 5 U.S.C. 8173; see also 5 U.S.C. 8116(c).[12] It is thus apparent

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[11] Indeed, this is somewhat clearer in the LHWCA than in many state provisions, because Section 5 refers to other remedies "at law or in admiralty for damages," a formulation that does not appear to cover state workers' compensation statutes.

[12] 42 U.S.C. 1651(c) provides:

> The liability * * * under this chapter shall be exclusive and in place of all other liability * * * under the workmen's compensation law of any State, Territory, or other jurisdiction * * *.

5 U.S.C. 8173 provides:

> This liability is exclusive and instead of all other liability of the United States or the instrumentality to the employee * * * and any other person otherwise entitled to recover * * * by an administrative or judicial proceeding under a workmen's compensation statute * * *.

that Section 5(a) of the LHWCA cannot be read to preclude state workers' compensation coverage.

3. *The Legislative History of the 1972 Amendments Does Not Indicate an Intention to Preempt State Law*

In *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), this Court described three principal concerns addressed in the 1972 amendments to the LHWCA. The one that is relevant here is the workers' desire "to improve the benefit schedule deemed inadequate by all parties." 432 U.S. at 261 (footnote omitted). In increasing these benefits, however, Congress recognized that it would be creating a great disparity between the level of federal compensation and the "significantly lower state rates." 432 U.S. at 262. Because under the then-existing law the amount of benefits received depended upon whether the injury occurred over water, Congress chose to extend federal coverage to certain land-based injuries so that maritime workers would not "be relegated to what Congress deemed clearly inadequate state compensation systems" depending upon where the workers happened to be injured. *Ibid.*

The discussion in the Senate and House Reports regarding the extension of the scope of the coverage confirms that Congress was principally concerned that adequate benefits be paid. The reports note that most states provided inadequate benefits and that "even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10 (1972). To correct this disparity, Congress determined "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. No. 92-1125, *supra*, at 13; H.R. Rep. No. 92-1441, *supra*, at 10-11. That is, Congress determined that benefits under the LHWCA should be uniformly available to maritime workers who in the course of their employment walk in and out of the coverage of the pre-1972 Act. There is no suggestion anywhere in the statute or the legislative history that Congress was concerned about, much less sought to eliminate, a recovery under state statutes that provided benefits more favorable than the LHWCA.[13]

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[13] Congress also sought to protect shipowners and employers from no-fault remedies (other than workers' compensation) available under the pre-1972 Act that were denying them the benefits of the exclusivity of workers' compensation. In return, the benefits within the workers' compensation scheme were to be increased. See *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 261-262. There was no intent to shield employers from generous workers' compensation benefits; that would have been contrary to this trade-off that was at the heart of the 1972 legislation.

Appellant relies in its preemption argument (Br. 42) upon a statement in the congressional reports that a disparity of benefits would result "if State laws are permitted to continue to apply to injuries occurring on land." But it is clear from the context of this statement, which follows an itemization of the inadequacies of state benefits as compared to the new LHWCA benefits, that the Senate and House Committees were concerned about the continuation of *exclusive* state coverage of injuries occurring on land. This exclusive state coverage was removed by the 1972 amendments. Permitting state laws to continue to operate *concurrently* with the new federal jurisdiction, however, does not present the problem of restricting workers to inadequate state benefits, because they can forgo state proceedings altogether or supplement any state award with an LHWCA award under the principles of *McCartin*. Accordingly, con-

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Moreover, the Senate Report notes that the amendments were "fully consistent with" the recommendations of the National Commission on State Workmen's Compensation Laws. S. Rep. No. 92-1125, *supra*, at 2. The Commission recommended that state benefits be based upon a "statewide average weekly wage." See Report of the National Commission on State Workmen's Compensation Laws 64, 71 (1972). LHWCA benefits are now based on a "national average weekly wage." 33 U.S.C. 906(b). In a state whose statute followed the Commission's recommendations and had a higher average wage than the national, it would not be consistent with the Commission's recommendations to preempt that state's workers' compensation law.

current jurisdiction is consistent with the concern expressed in the committee reports.[14]

The legislative history of the statute thus lends no support to the contention that the 1972 amendments sought to preempt state law. Certainly no such intention is "clear and manifest." *Rice* v. *Santa Fe Elevator Corp., supra,* 331 U.S. at 230.

B. Concurrent State Coverage, So Long As Supplemental Awards Are Permitted, Does Not Conflict With The Proper Operation Of The LHWCA

The fundamental purpose of the 1972 expansion of LHWCA coverage was to make the benefits provided under the Act available, as a minimum, to those employees who were brought within its coverage. Any state statute that serves to prevent a covered employee from receiving these benefits conflicts with this purpose and is unenforceable. However, a state law that operates concurrently with the LHWCA, along the lines of the relationship between state statutes set out in *McCartin,* complements, rather than conflicts with, the LHWCA. A state statute, such as the one involved in this case, that provides for a greater benefit than the LHWCA does not frustrate the purpose of the federal statute to provide a minimum level of benefits to injured workers. And a state statute that provides smaller benefits also does

[14] It is also worth noting that the statement relied on by appellant cannot be taken to represent a congressional decision to preempt state coverage, because it is unlikely that such a decision would have been advanced without extended discussion of *Davis* and *Calbeck.* Those cases are not even mentioned in this section of the House and Senate Reports. See G. Gilmore & C. Black, *The Law of Admiralty* 425 (2d ed. 1975).

not conflict with this purpose of the LHWCA so long as the employee is not barred by receipt of a state award from recovering a supplemental award under the LHWCA.

The *McCartin* framework has worked well in the area of state workers' compensation statutes. It permits the vindication of each jurisdiction's strong interest in providing the benefits available under its own compensation law. It also permits the injured employee to receive the full benefits to which he is entitled—benefits that the employee would have received without the need for a supplemental award if he had initially chosen the most favorable forum in which to seek an award. Yet these advantages are obtained at little cost to the employer, because double recovery is prevented by crediting the amounts paid under the first award against the second award. These principles are equally applicable in the state-federal context. It has therefore generally been recognized that the concurrent jurisdiction between state law and the LHWCA should operate under the principles of *McCartin.* See G. Gilmore & C. Black, *The Law of Admiralty* 431-433 (2d ed. 1975); 4 A. Larson, *The Law of Workmen's Compensation* § 89.53 (1978); Watson, *Broadened Coverage Under The LHWCA,* 33 La. L. Rev. 683, 694-695 (1973).

In *Thomas* v. *Washington Gas Light Co.,* No. 79-116, argued March 19, 1980, this Court is presented with the question of the continuing validity of the existing system of concurrent jurisdiction between state workers' compensation statutes. If the Court cuts back on the principle of supplemental awards

recognized by *McCartin*, that decision could affect the relationship between state law and the LHWCA. If a modification of *McCartin* in *Thomas* has the effect of barring a supplemental award under the LHWCA,[15] a state award that provides less favorable benefits than those provided under the LHWCA would conflict with the LHWCA because it would prevent the employee from receiving the level of benefits guaranteed to him by the federal statute. In such circumstances, the prior state proceeding would frustrate the intent of Congress in passing the 1972 amendments.[16] Thus, concurrent jurisdiction between state law and the LHWCA depends upon the continuing validity of the

[15] It does not necessarily follow that supplemental awards under the LHWCA should be barred simply because supplemental *state* awards are barred. Under *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), a state may render an award under its workers' compensation statute exclusive of an award under the statute of another state, if it clearly expresses its intent to do so. Because of the supremacy of federal law, however, Congress may override a state's attempt to preclude the issuance of a federal award. Thus, when the application of a state statute purports to exclude a remedy under the LHWCA, the LHWCA should perhaps be read to preempt the exclusivity provision of the state law. Cf. 33 U.S.C. 915(b) and 916.

[16] This problem is illustrated by *Landry* v. *Carlson Mooring Service*, 9 B.R.B.S. 518 (1978), appeal pending, Nos. 79-1274 and 79-1479 (5th Cir.). In *Landry*, an employee received a $20,000 award under the Texas workers' compensation statute. This award was then held to bar a claim under the LHWCA, under which the employee would have been entitled to significantly higher benefits. We agree with appellant (Br. 56) that the decision in *Landry* frustrates the purposes of the LHWCA. However, we do not agree that the solution to the *Landry* problem is to preempt state coverage; rather, we submit that *Landry* is wrongly decided. First, it misinterprets this Court's decision in *McCartin* with respect to the preclusive effect to be given to the Texas award. Second, it fails to consider the supremacy of the LHWCA to state law, which enables the LHWCA to override any alleged intent of Texas to preclude a federal award.

principle of supplemental awards under the LHWCA. If supplemental awards under the LHWCA were to be barred, state coverage must be held to be preempted when it overlaps with the LHWCA, either completely or at least to the extent that the state benefits are less favorable than the federal.

Assuming that supplemental awards under the LHWCA continue to be permitted, we submit that a system of concurrent jurisdiction contributes to the smooth administration of the LHWCA. If federal jurisdiction is held to preempt state coverage, employers would be able to assert the threshold defense that an injury is covered by the LHWCA, and thus not by state law, in proceedings under state compensation acts. As appellant notes (Br. 46), the line of federal coverage drawn by the 1972 Amendments is by no means a clear one. See, *e.g.*, *P. C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979); *Northeast Marine Terminal Co.* v. *Caputo*, *supra*. Hence, under a system of exclusive jurisdiction, state courts would be forced to wrestle with difficult questions of coverage under the LHWCA, which can only result in greater delay in ultimately awarding deserving claimants workers' compensation benefits. Moreover, the policy of promoting uniformity of interpretation of the LHWCA by restricting review under the Act to a single administrative tribunal and the federal courts of appeals would be substantially undermined.

If the 1972 amendments are held to preempt state law, the courts would be faced with a situation similar to the one that prevailed between 1927 and 1942 under the "maritime but local" test—two spheres of mutually exclusive jurisdiction divided by a blurry line. That situation has been described as "undesirable in the highest degree" for the administration of the Act. G. Gilmore & C. Black, *The Law of Admiralty* 425 (2d ed. 1975). See also *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 259. Moreover, it would place a severe burden on the claimant, who will often be unable to tell whether state or federal law applies; he might choose to pursue what turns out to be the wrong remedy while losing the opportunity to pursue the correct one. See *Davis* v. *Department of Labor and Industries*, *supra*, 317 U.S. at 254.[17] The appropriate solution is for state and federal law to apply concurrently, with supplemental awards permitted if a credit is given for the amounts paid under the first award.[18] Accordingly, the court below correctly concluded that the 1972 amendments to the LHWCA do not preempt state law. See *Poche* v. *Avondale Shipyards, Inc.*, 339 So.2d 1212, 1220 (La.

[17] Indeed, such a situation recently occurred. A Florida court held that it could not apply its otherwise applicable statute because the LHWCA covered the injury. However, the Benefits Review Board held that the LHWCA was not applicable. *Holcomb* v. *Robert W. Kirk and Associates, Inc.*, No. 78-566 (B.R.B. Feb. 28, 1980). This Court alone could resolve such a conflict.

[18] If Congress determines that the concurrent operation of state law is interfering with the administration of the LHWCA, it would be a simple matter for it to make the federal coverage preemptive by express statutory language.

1976), appeal dismissed, 434 U.S. 803 (1977); *Umbehagen* v. *Equitable Equipment Co.*, *supra*; *Johnson* v. *Texas Employers Insurance Ass'n*, 558 S.W.2d 47 (Tex. Civ. App. 1977). See 4 A. Larson, *The Law of Workmen's Compensation* §§ 89.53, 89.70 (1978); G. Gilmore & C. Black, *The Law of Admiralty* 424-426, 431-434 (2d ed. 1975); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683, 694-695 (1973).

CONCLUSION

The judgment of the Commonwealth Court should be affirmed.

Respectfully submitted.

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APRIL 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 317156 277